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April 12, 1977

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Mr. Brian R. Lensink, Chief
Bureau of Mental Retardation
Arizona Department of Economic Security
1717 West Jefferson
Phoenix, Arizona 85007

Re: 77-83 (R77-83)

Dear Mr. Lensink:

Your written inquiry of March 1, 1977, requests our opinion concerning how to obtain a valid consent for medical care of mentally retarded adults where no guardian has been appointed for those persons.

Before discussing the specific questions you have posed, we note that the document attached to the opinion request entitled "Affidavit Consent for Medical Treatment" attempts to work a blanket consent for all medical care which might be received during the mentally retarded person's residence in a training program. For the reasons discussed below, we advise you to secure the informed consent of the parent, guardian or other appropriate person for each specific procedure necessitating consent, unless a true medical emergency exists requiring immediate action which cannot await the obtaining of the consent.

The necessity of securing consent prior to a surgical procedure, for example, is that, in the absence of consent or some exception to the necessity thereof, the physician's touching of the patient thereby constitutes a battery. While the physician's skill in performing the surgical procedure may equal or exceed the relevant standard of medical practice (and therefore not give rise to liability for malpractice), liability may be predicated upon the fact that

1. A battery occurs where a person is touched by another without lawful consent. The absence of physical injury bears upon the question of damages and not the right of action. See, e.g., 6 C.J.S.; Assault and Battery, § 7.

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the operation was non-consensual. Shetter v. Rochelle, 2 Ariz.App. 358, 409 P.2d 74 (1965), opinion modified, rehearing denied 2 Ariz.App. 607, 411 P.2d 45 (1966).

The general rule seems to have become well established that, before a physician or surgeon may perform an operation upon a patient, he must must obtain the consent either of the patient, if competent to give it, or of someone legally authorized to give it for him, unless immediate operation is necessary to save the patient's life or health, although under exceptional circumstances the consent may be regarded as having been impliedly given. (The action for operating without consent seems usually to be regarded as one for assault or trespass, rather than for negligence.)

2 Ariz.App. at 363.

Your consent form attempts to effectuate a blanket consent. By this we mean that the consent is given without regard to a particular medical or surgical procedure or an explanation of that procedure, its risks, potential benefits and alternatives to the parent or guardian.

. . . [A] consent to a surgical procedure is effectual if the consenter understands substantially the nature of the surgical procedure attempted and the probable results of the operation. This, as a matter of law, constitutes an informed consent. Lacking this, the operation is a battery unless one special exception pertains.

2 Ariz.App. at 370.

See also Riedisser v. Nelson, 111 Ariz. 542, 534 P.2d 1052 (1975), and Fiske v. Soland, 8 Ariz.App. 585, 448 P.2d 429 (1969).

Conversely, consent which does not involve an understanding of the specific procedure, its risks and probable results is ineffectual. By definition, without reference to or explanation of a particular procedure, informed consent to the use of that procedure cannot be given. Rogers v. Lumbermans Mutual Casualty Co., 119 So.2d 649 (La. App., 1960). Because your consent form does not contain a specific consent for a particular procedure after an appropriate explanation of that procedure, you should immediately cease using that form, and

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instead should use at a minimum a specific consent form coupled with a timely explanation of the procedure, its risks, probable consequences and alternative procedures.²

We now turn to your inquiry which asks who may consent to medical care for mentally retarded adult residents of an Arizona Training Program where no guardian exists. If the mentally retarded adult meets the definition of incapacitated person³ then, in the absence of a true medical emergency necessitating immediate action to save the life, eyesight, hearing or member of the person, the appointment of a guardian should be sought. Where no other person is willing and qualified to serve, the public fiduciary for the county in which the training center is located should be appointed as guardian. A.R.S. § 14-5302. A.R.S. § 14-5601 mandates the establishment of a public fiduciary in each county by its board of supervisors for those situations where no other person is qualified and willing to act as the guardian of a person in need of guardianship. A.R.S. § 14-5602.

2. Although not binding upon the Department of Economic Security, the definition of informed consent set forth in the Mental Health Code at A.R.S. § 36-501.13 is informative:

"Informed consent" means a decision following presentation of all facts necessary to form the basis of an intelligent consent by the patient or guardian with no minimizing of known dangers of any procedures.

3. A.R.S. § 14-5101.1 defines incapacitated person as:

"Incapacitated person" means any person who is impaired by reason of mental illness, mental deficiency, mental disorder, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication or other cause, except minority, to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person.
(Emphasis added.)

Of course, it does not necessarily follow that all persons diagnosed as retarded persons will meet this definition and, to the extent that such a person can understand the medical procedure, its probability of success, consequences, risks and alternatives, that person may give effective consent.

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On the other hand, "[I]f an incapacitated person has no guardian and an emergency exists, the court may exercise the power of a guardian pending notice and hearing". A.R.S. § 14-5310. The plain meaning of the language of this section provides the Department with the opportunity to secure, in an emergency, the appropriate consent of the court acting as a guardian. Where the nature of the medical emergency will not permit even a temporary appointment of a guardian or judicial consent envisioned above, you should of course act immediately to save life or prevent permanent injury. See Atty.Gen.Op. No. ~~R75-102~~¹⁷⁶⁻²⁵³ and R75-189. This emergency exception to the general requirement of consent is now well recognized. See, e.g., Shetter v. Rochelle, *supra*; A.R.S. § 36-2271(C); A.R.S. § 32-1471; and 6A C.J.S. Assault and Battery, § 7.

A guardian, once properly appointed, is vested with the same powers relative to his ward as is a parent relative to his unemancipated minor child. A.R.S. § 14-5312. Specifically, the guardian may establish the ward's place of residence⁴ and consent to medical care and treatment. A.R.S. § 14-5312.A.1 and 3.

The residence or location of the parents of a mentally retarded adult is of no legal significance in this inquiry. The location of the parents and their willingness to serve as guardians bears only upon the person who might be selected as guardian. Because a public fiduciary is mandated in each county if the parents are unwilling or unable to serve as guardian, and if there is no one else willing or able to serve as guardian, the public fiduciary should be appointed to fulfill this function.

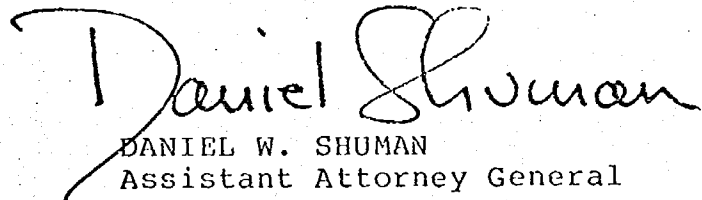
4. But see Pima Fiduciary v. Superior Court, 26 Ariz.App. 8595, 547 P.2d 354 (1976) holding that a guardian could not, ex parte, volunteer his ward for in-patient psychiatric hospitalization under A.R.S. § 36-518.

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A practical consequence of the parents' foreign residence or unwillingness to serve as guardian is shifting the burden of petitioning the court for the appointment of a guardian. Conceivably this burden could fall in the first instance upon the public fiduciary, the training centers, or the parents. Where the parents refuse to cooperate, it is more properly the function of the public fiduciary, upon receipt of a request accompanied by the necessary supporting documentation, to petition the court for appointment. Although filing a petition for the appointment of a guardian is arguably within the powers of the state agency (Atty.Gen.Op. No. ~~875-1744~~), the public fiduciary's office should be better suited to performance of this function.

Sincerely,

BRUCE E. BABBITT
Attorney General


DANIEL W. SHUMAN
Assistant Attorney General

BEB:DWS:jrs

cc: Mr. John L. Huerta, Director
Arizona Department of Economic Security